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FEE STRUCTURE REPORT

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1. Current Charges and Receipts

The following schedule details current charges and receipts for materials and services which the BRA provides.

Schedule of Charges and Receipts

<u>Item</u>	<u>Charge</u>	<u>Receipts</u> (FY 87)
<u>121A Fees</u>		
1. Application	\$6,000.00	\$5,000.00
2. Amendment requiring hearing	\$4,500.00	
3. Amendment not requiring hearing	\$3,500.00	
<u>121B Fees</u>		
1. Developer Kits and Publications	\$2.00 to \$200.00	\$22,619.43
2. Developer Proposal Fees	\$0 to \$10,000.00	
<u>Zoning Commission Fees</u>		\$429.75
1. Zoning Amendment Application	\$225.00	
2. Annual Subscription to Amendments	\$ 25.00	
3. Annual Subscription to Amend Pages	\$ 25.00	
<u>Bid Documents</u>	\$25.00-\$250.00	
<u>Materials and Services</u>		
1. Maps	\$3.00 to \$15.00	\$35,058.00
2. Reproductions	\$0.25/page	\$922.60
3. Graphic Design Services	\$75.00/hour	(\$52.27)

Analysis of this information indicates that greater vigilance in collecting established fees would defray much of the cost of regulating certain projects. Introduction of certain new fees would be consistent with the fee schedule already established.

121A Fees

Only one application was received in 1987, and no amendments. The discrepancy between the receipt (\$5,000) and the charge (\$6,000) occurred because the fee was raised to \$6,000 during the year. Fees are collected prior to the scheduling of hearings or the grant of amendments. If the proponent does not pay, the Secretary refuses to schedule the hearing or allow the amendment application to proceed.

121B Fees

These fees are charged for developer kits and proposals, i.e., projects which require execution of a Land Disposition Agreement with the BRA. For FY87, Developer Proposal fees were included in the calculation of proceeds from Developer Kits and Publications, totaling \$22,619.43.

Anecdotal evidence suggests that the BRA instituted fees for kits and proposal submissions to ensure that only "serious" submissions were made. In some cases, the fees are substantial. For example, the kit for Parcel-to-Parcel II cost \$100 (about fifty were sold). The developer proposal fee for Parcel-to-Parcel II was \$7,500, \$2,500 of which is refundable to the losing entries. Thus, the total amount the BRA will receive from the development fees equals \$25,000.

Zoning Commission Fees

Proponents of zoning code amendments, including applicants for Planned Development Area (PDA) approval, pay the \$225 fees. Most subscribers to the zoning code amendments, at \$25 per annum, are law firms. Both these fees understate the cost to the BRA of providing the service, particularly the \$225 fee for a zoning code amendment involving a PDA. Any increased fees

should account for amendments proposed by citizens and neighborhood groups. To account for instances like the Triangle Block, a third category, based on applications for increased height and density, could be used.

II. Development Processing Costs

Executive Summary

Using time management reports covering the period from May 1986 through September 1987, the costs of processing thirteen development projects were estimated. Significant patterns which emerged included:

- a. The range of gross costs for all projects went from \$7,995 (73 Tremont) to \$380,642 (Fan Pier). Ten of thirteen were in the range of \$10,000 to \$60,000, and seven were in the range of \$15,000 to \$50,000.
- b. Office projects cost a median of about 7.5¢ per square foot, with Fan Pier and Kingston-Bedford/Parcel 18 more costly and Traveler's less costly on a unit basis. Gross costs for new construction ranged from about \$15,000 to \$50,000, excepting Fan Pier and Kingston-Bedford.
- c. Residential projects were more costly than office projects on a unit basis (about 12¢ per square foot), but gross costs fell into a similar range, of about \$18,000 to \$55,000.
- d. Projects which required neither a PDA nor an LDA incurred lower gross costs, with a median cost of about \$17,500. These projects would now be DRR projects.
- e. Projects requiring an LDA incurred higher unit costs than PDAs, about 13.6¢ per square foot, but when these projects were PDAs, the unit cost was lower.

- f. Projects receiving PDA Designation incurred an average cost of \$37,422 (not including Fan Pier).

A. Introduction

Data for development processing costs were taken from the Time Management Reports produced by A&F for the period May 1986 through September 1987.

All developments identifiable as discrete projects in these reports were studied. The following projects were analyzed for this study:

1. Clippership Wharf;
2. Fan Pier;
3. 110-120 Tremont Street;
4. 125 Summer Street;
5. Traveler's Building;
6. Portland Place;
7. Lowell Square;
8. Heritage on the Garden;
9. Parkside West;
10. 500 Boylston Street;
11. 73 Tremont Street;
12. Kingston-Bedford/Parcel 18; and
13. Baker Chocolate Mills.

A&F has assigned a project code to each of these developments. Staff report the hours worked on each project each week to A&F. A&F calculates the cost to the BRA of each project using a formula based on the reporting employee's salary plus a portion of overhead attributable to the employee.

Two caveats accompany the analysis of the project cost data. First, the time management reports do not cover the entire period in which the BRA processes each project. The May 1986 through September 1987 period which the Time Management Reports cover includes only a limited period in the processing of the developments. The processing of some developments was nearing completion during this time, while the processing of others was just beginning. This analysis does not account for processing which may have occurred prior to May 1986, or any processing a project may undergo subsequent to September 1987.

Second, costs have been estimated on the hours worked on each project, as reported by responsible staff. The staff's accuracy in reporting hours worked per project is a critical element for which no control was possible. This analysis probably understates project costs, as it does not track hours worked which staff attributed to general categories (e.g., "Legal Research").

B. Analysis

Using the gross hours reported by staff and the resulting estimated costs (based on A&F's formula), a set of critical factors was established which might yield information as to the cost associated with particular kinds of developments. One critical factor -- the decision whether to assign a unique project code to a specific development -- could not be controlled. The determinants used to analyze project costs were size, use (office or residential), location, and level of regulatory approval (PDA, LDA, or neither).

1. Size

Estimated processing costs ranged from \$7,995 (73 Tremont Street) to \$380,642 (Fan Pier). Of the fourteen projects analyzed, six had estimated costs of between \$25,000 and \$55,000. Five projects had estimated

costs of less than \$25,000 (110-120 Tremont at \$13,920, Portland Place at \$16,189, Parkside West at \$19,930, 73 Tremont Street at \$7,995, and Baker Mills at \$17,942). Three projects exceeded \$55,000 in estimated costs (Fan Pier at \$380,642, Kingston-Bedford/Parcel 18 at \$229,205, and Prudential at \$76,965).

The estimated costs per square foot of each project did not increase with the size of the project. Costs per square foot ranged from 2.7¢ (73 Tremont Street) to 20.6¢ (Parkside West). Three projects cost about 3¢ per square foot (Traveler's at 2.9¢, 73 Tremont at 2.7¢, and Baker Mills at 3.2¢). Four projects cost about 7¢ per square foot (110-120 Tremont, Portland Place, and 500 Boylston Street at 7¢, 125 Summer at 7.7¢). Six projects exceeded 10¢ per square foot (Clippership Wharf at 10.6¢, Fan Pier at 11.9¢, Lowell Square at 13.3¢, Heritage on the Garden at 14.7¢, Parkside West at 20.6¢, and Kingston-Bedford/Parcel 18 at 12.9¢).

<u>Project</u>	<u>Size (sf)</u>	<u>Est. Cost</u>	<u>Unit Cost</u>
Fan Pier	3,200,000	380,642	11.9
Kingston-Bedford/ Parcel 18	1,770,000	229,205	12.9
Traveler's	1,406,000	41,409	2.9
500 Boylston	725,000	50,442	7.0
Baker Mills	555,326	17,942	3.2
125 Summer	448,445	34,742	7.7
Lowell Square	407,802	54,183	13.3
Clippership Wharf	375,000	39,896	10.6
73 Tremont	296,000	7,995	2.7
Portland Place	232,684	16,189	7.0
110-120 Tremont	200,000	13,920	7.0
Heritage	189,000	27,785	14.7
Parkside West	96,551	19,930	20.6
Prudential	--	76,965	--

The data indicate that gross costs vary over a much wider range than per square foot costs. While gross costs varied by a factor of almost fifty, per square foot costs varied by a factor of less than eight. One

conclusion may be that while larger projects do require more processing, there is little correlation between size and intensity of processing. Still, this mode of analysis -- comparing gross costs and unit (per square foot) costs -- will be used in the other analyses.

2. Use

The estimated project costs were analyzed by use, with each project categorized as either office or residential. Lowell Square and Heritage on the Garden were categorized as residential, and Fan Pier was categorized as office.

a. Office

Eight projects categorized as office were analyzed. Total staff costs covered the full range of \$7,995 (73 Tremont Street) to \$380,642 (Fan Pier). Five of the projects range from \$13,920 to \$50,442 in gross costs. Unit costs established a much narrower range, from 2.7¢ per square foot (73 Tremont Street) to 12.9¢ per square foot (Kingston-Bedford/Parcel 18). Four projects cost about 7¢ per square foot (110-120 Tremont Street, 125 Summer Street, Portland Place, and 500 Boylston Street). Two projects were over 10¢ (Fan Pier and Kingston-Bedford (Parcel 18) and two were under 3¢ (Traveler's and 73 Tremont).

<u>Project</u>	<u>Size (sf)</u>	<u>Est. Cost</u>	<u>Unit Cost</u>
Fan Pier	3,200,000	380,642	11.9
Kingston-Bedford/ Parcel 18	1,770,000	229,205	12.9
Traveler's	1,406,000	41,409	2.9
500 Boylston	725,000	50,442	7.0
125 Summer	448,445	34,742	7.7
73 Tremont	296,000	7,995	2.7
Portland Place	232,684	16,189	7.0
110-120 Tremont	200,000	13,920	7.0

b. Residential

Five projects were categorized as residential. Estimated costs ranged from \$17,942 (Baker Mills) to \$54,183 (Lowell Square). Unit costs ranged from 3.2¢ per square foot (Baker Mills) to 20.6¢ per square foot (Parkside West). Three projects had unit costs of between ten and fifteen cents per square foot (Clippership Wharf at 10.6¢, Lowell Square at 13.3¢, and Heritage on the Garden at 14.7¢). Thus, the range of gross costs was narrower than the range of unit costs.

<u>Project</u>	<u>Size (sf)</u>	<u>Est. Cost</u>	<u>Unit Cost</u>
Baker Mills	555,326	17,942	3.2
Lowell Square	407,802	54,183	13.3
Clippership Wharf	375,000	39,896	10.6
Heritage	189,000	27,785	14.7
Parkside West	96,551	19,930	20.6

c. Conclusion

The most significant conclusion from the use analysis is that while residential projects exhibit a much higher unit cost (almost double) that of office projects, gross costs fall within a similar range. Most projects cost between \$15,000 and \$50,000 to process, and unit costs average 7.5¢ per square foot for office projects and 12.5¢ per square foot for residential projects.

3. Location

Location was analyzed as a factor, but was found not to be significant. Of the fourteen projects studied, only two (Clippership Wharf and Baker Mills) are located outside the Downtown/Northern Avenue Corridor area. Gross costs were \$17,942 for Baker Mills and \$39,896 for Clippership

Wharf. Unit costs were 10.6¢ per square foot for Clippership Wharf and 3.2¢ per square foot for Baker Mills. These figures do not vary significantly from ranges established on the basis of factors such as use and regulatory approval required.

4. Regulatory Approval

Project costs as related to regulatory approval were analyzed, on the basis of the project requiring a PDA and/or an LDA. The requirement of DIPP approval was not significant, since with the exception of Heritage on the Garden, none of the residential projects required a DIPP while all of the office projects required a DIPP.

Six different forms of required regulatory approval were studied for all projects. Each of the six analyses was then performed for residential and office projects. The six analyses included:

1. Projects receiving PDA designations (PDAs);
2. Projects which are the subject of an LDA (LDAs);
3. Projects receiving neither PDA designation nor the subject of an LDA;
4. PDAs without an LDA;
5. LDAs without a PDA; and
6. PDAs with LDAs.

a. PDAs

Estimated gross costs for the five PDAs ranged from \$17,942 (Baker Mills) to \$380,642 (Fan Pier). Others included Clippership Wharf (\$39,896), Traveler's (\$41,409), and 500 Boylston Street (\$50,442).

Unit costs ranged from 2.9¢ per square foot (Traveler's) to 11.9¢

per square foot (Fan Pier), with Clippership Wharf at 10.6¢, 500 Boylston Street at 7¢, and Baker Mills at 3.2¢. This variation indicates that office PDAs (with the exception of Fan Pier) incur slightly greater gross costs than residential projects, across a similar unit cost range.

<u>Project</u>	<u>Use</u>	<u>Est. Cost</u>	<u>Unit Cost</u>
Fan Pier	Office	380,642	11.9
Traveler's	Office	41,409	2.9
500 Boylston	Office	50,442	7.0
Baker Mills	Residential	17,942	3.2
Clippership Wharf	Residential	39,896	10.6

b. LDAs

Estimated gross costs for the five LDAs ranged from \$27,785 (Heritage) to \$229,205 (Kingston-Bedford/Parcel 18). Others included Lowell Square (\$54,183) and 500 Boylston Street (\$50,442). Unit costs ranged from 7.0¢ per square foot (500 Boylston) to 14.7¢ per square foot (Heritage on the Garden), with Lowell Square at 13.3¢, and Kingston-Bedford/Parcel 18 at 12.9¢. This variation indicates that office LDAs incur greater gross costs than residential LDAs, within the same range of unit costs. 500 Boylston's lower unit cost is probably attributable to the fact that the project was well advanced prior to May, 1986.

<u>Project</u>	<u>Use</u>	<u>Est. Cost</u>	<u>Unit Cost</u>
Kingston-Bedford/ Parcel 18	Office	229,205	12.9
500 Boylston	Office	50,442	7.0
Lowell Square	Residential	54,183	13.3
Heritage	Residential	27,785	14.7

c. Neither PDA nor LDA

Five projects required neither a PDA nor an LDA. Gross costs ranged from \$7,995 (73 Tremont) to \$34,742 (125 Summer Street).

Others included 110-120 Tremont Street (\$13,930), Portland Place (\$16,189), and Parkside West (\$19,930). Unit costs ranged from 2.7¢ per square foot (73 Tremont Street) to 20.6¢ per square foot (Parkside West), with 110-120 Tremont Street at 7¢, 125 Summer Street at 7.7¢, and Portland Place at 7¢. This variation indicates that gross costs for these projects fall within a relatively narrow range, regardless of whether the project is office or residential. However, unit costs were significantly higher for the residential project (Parkside West) than for the office projects.

<u>Project</u>	<u>Use</u>	<u>Est. Cost</u>	<u>Unit Cost</u>
125 Summer	Office	34,742	7.7
73 Tremont	Office	7,995	2.7
Portland Place	Office	16,189	7.0
110-120 Tremont	Office	13,920	7.0
Parkside West	Residential	19,930	20.6

d. PDA's without LDAs

Four projects were PDAs without requiring LDAs, Baker Mills, Clippership Wharf, Fan Pier, and Traveler's. Gross costs were \$17,942 (Baker Mills), \$39,896 (Clippership Wharf), \$41,409 (Traveler's), and \$380,642 (Fan Pier). Unit costs ranged from 2.9¢ for Travelers, to 3.2¢ for Baker Mills, to 10.6¢ for Clippership Wharf, to 11.9¢ for Fan Pier. Wide variations were found in both unit and gross costs.

<u>Project</u>	<u>Use</u>	<u>Est. Cost</u>	<u>Unit Cost</u>
Fan Pier	Office	380,642	11.9
Traveler's	Office	41,409	2.9
Clippership	Residential	39,896	10.6
Baker Mills	Residential	17,942	3.2

e. LDAs without PDAs

Three projects were LDAs without receiving PDA designation: Lowell Square, Heritage on the Garden, and Kingston-Bedford/

Parcel 18. Gross costs exhibited a wide range, from \$27,785 (Heritage on the Garden) to \$54,183 (Lowell Square) to \$229,205 (Kingston-Bedford/Parcel 18). Unit costs were within the narrowest range studied: 12.9¢ for Kingston-Bedford/Parcel 18, 13.3¢ for Lowell Square, and 14.7¢ for Heritage on the Garden. This is also a high unit cost range, leading to the conclusion that LDAs have higher unit costs than non-LDA projects.

<u>Project</u>	<u>Use</u>	<u>Est. Cost</u>	<u>Unit Cost</u>
Kingston-Bedford/ Parcel 18	Office	229,205	12.9
Lowell Square	Residential	54,183	13.3
Heritage	Residential	27,785	14.7

f. Both PDAs and LDAs

Only one project was both a PDA and an LDA, 500 Boylston Street. Gross costs were \$50,442, while unit costs were 7¢ per square foot. This data is inconclusive, as to the additional or lower cost PDA designation may result in for an LDA.

<u>Project</u>	<u>Use</u>	<u>Est. Cost</u>	<u>Unit Cost</u>
500 Boylston	Office	50,442	7.0

III. Statutory Authorization for Imposition of Fees

Imposition of regulatory fees by means of a zoning code amendment must be within the implied or express authority granted the Zoning Commission (BZC) in the Zoning Enabling Act for the City of Boston, St. 1956, c. 665, as amended. Consideration should also be given to the Home Rule Amendment (Article 89, s.6) as a source of power for the enactment of a compensatory fee schedule. The authority to impose fees for the costs of disposing of land pursuant to c.121B is separate from that available pursuant to the BRA's planning function, and has already been instituted (see Section 1).

The SJC has recognized the validity of imposing an exaction as a regulatory fee as a means to "reimburs[e] the city for all expenses imposed upon it by the business sought to be regulated." In calculating such a fee, the court has noted that "it is proper and reasonable to take into account not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed." Emerson College v. City of Boston, 391 Mass. 415, 462, N.E.2d 1098, 1105, n. 16 (1984).

1. Authority Under the Zoning Enabling Act

(a) Express Authority

The Zoning Enabling Act provides express authority for the imposition of fees in three places. Section 3 provides that a petitioner:

...shall not be entitled to have his proposed amendment considered by the [zoning] commission unless he pays the city such sum, if any, as may from time to time be established by the zoning regulation as the estimated average cost to the city of a hearing on a proposed amendment of the zoning regulation."

Section 8 provides for the imposition of fees (of twenty-five dollars or "such other sum as the city council with the approval of the mayor may from time to time prescribe") by the Commissioner of the Inspectional Services Department for appeals to the Board of Appeal. Section 11 establishes the conditions under which costs may be awarded in cases in which the Board of Appeal's decision is appealed to the Superior Court.

Section 3 appears to provide explicit authorization for the imposition of regulatory fees which compensate the city for the costs associated with applications for Planned Development Area (PDA) approval. Currently, a charge of \$225 is imposed.

The imposition of regulatory fees for projects which require zoning relief, such as DIPPs, is authorized under Section 8, but establishing a reasonably compensatory amount would appear to require city council and Mayoral approval (the current charge is \$100 per item of required relief. Imposition of a regulatory fee for as-of-right projects requiring site plan approval (such as DRR projects) would need implicit authorization.

However, Section 8 does not specify what costs the fee is intended to defray. Section 8 also does not imply that it is the only manner in which regulatory costs incurred on account of appeals to the Board of Appeal may be defrayed. The fact that the fee is payable to the building commissioner implies that the fees are intended to defray the costs of the building commissioner and the Board of Appeal in processing the appeal.

This interpretation is strengthened by Appendix 1 of the Zoning Code, which provides that these fees "shall include the cost to the city of publishing and sending notices of hearing as required by law."

Provision for defraying the BRA's costs in preparing the recommendation

required by the Zoning Code has not been made pursuant to Section 8. Therefore, charging fees to defray the BRA's costs would not conflict with Section 8.

(b) Implicit Authority

(i) Existence of Implicit Authority

The grant of an express power to a municipal government under a special law carries with it all unexpressed, incidental powers necessary to carry it into effect. Flynn v. City of Cambridge, 383 Mass. 152, 158 (1981). The New York Court of Appeals has held that where the power to enact fees is implied and not express, the fees charged must be reasonably necessary to the accomplishment of the statutory command, i.e., the delegation must be accompanied by standards. Jewish Reconstructionist Synagogue of the North Shore v. Incorporated Village of Roslyn Harbor et al., 40 N.Y.2d 158, 352 N.E.2d 115, 118 (1976) (extraordinary processing fees, such as rental cost of meeting hall, invalidated).

The standards are necessary, because where the local agency has the unilateral power to incur costs, then the potential for an arbitrary and discriminatory incurrence of costs exists which could discourage those seeking zoning relief from exercising this right. The fees must be based on experience and factual studies, and rational classifications based on size and use are allowable. Jewish Reconstructionist Synagogue of the North Shore at 352 N.E.2d at 118. It is important to note that the court found implicit authorization existed to enact fees for the pursuit of zoning relief despite its characterization of that pursuit as a right rather than a benefit.

In Massachusetts, the general principle regarding implicit statutory authority requires a sharp conflict between the local and State provisions before the local regulation is held invalid. Bloom v. Worcester, 363 Mass. 136, 154 (1973). Massachusetts courts give substantial deference to the construction placed on a statute or an ordinance by the agency charged with its administration. See, e.g., Manning, et al. v. Boston Redevelopment Authority, et al., 400 Mass. 444 (1987). A similar principle applies to the determination of the amount of latitude to be given municipalities. Chelmsford Trailer Park, Inc. v. Town of Chelmsford, 393 Mass. 186, 190 (1984).

The Supreme Judicial Court has held that an express statutory grant to a municipality or agency of authority to regulate includes authorization to require licenses and licensing fees "to cover reasonable expenses incidental to the enforcement of the rules," so long as the imposition of the fees furthers the purposes of the act. Southview Cooperative Housing Corp. v. Rent-Control Board of Cambridge, 396 Mass. 395, 399-400 (1985) (quoting Opinion of the Justices, 250 Mass. 591, 602 (1924) (imposition of fees on landlords to compensate for costs of processing rent adjustment applications validly authorized)).

The SJC rejected the trial judge's reasoning that imposition of the fees burdened the landlords' right to pursue a fair net operating income, noting that fees could validly be imposed for parade licenses despite the fact that fundamental First Amendment rights were at stake. See, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941); Commonwealth v. Plaisted, 148 Mass. 375 (1889). Absent a showing that the fees are excessive or that the landlords lacked the resources to pay the fees and were thus unable to pursue their rights, the board was authorized to charge fees in connection with the

services it performed. Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. at 401; compare Boddie v. Connecticut, 401 U.S. 371 (1971).

Despite the General Court's expressly granting the power to impose an excise tax to defray certain costs, a municipality may impose an additional regulatory fee to defray such costs. Commonwealth v. Caldwell, Slip Op. No. 87-654 (Mass. App. Ct. November 19, 1987). That court required only that "the revenue collected is not significantly and consistently in excess of the cost of providing the services." See Slip Op. at p.9. The Southview case provides support for the contention that Massachusetts sanctions imposition of regulatory fees for development processing based on implicit authorization, even if the pursuit of development processing is characterized as a right and not a privilege. The Caldwell case establishes that the existence of other sources of revenues to defray costs does not prohibit the imposition of reasonable fees, based on implicit authorization.

(ii) Fee or Tax?

The issue of whether implicit authority for the imposition of regulatory fees exists in the Zoning Enabling Act raises the question of whether the regulation would be characterized as a fee or a tax. If characterized as a tax, authority would have to be express. See Emerson College v. City of Boston, 391 Mass. 415, 462 N.E.2d 1098 (1984)(exaction for augmented fire service availability held an invalid tax).

In Emerson College the SJC outlined three standards for determining whether an exaction was a fee. Whether denominated user or regulatory fees, these exactions are distinct from taxes in that (1) they are charged in exchange for a particular governmental service which benefits the party paying

the fee in a manner "not shared by other members of society," id. at 1105 (quoting National Cable Television Ass'n v. United States, 415 U.S. 336, 341, 94 S.Ct. 1146, 1149, 39 L.Ed. 370 (1974)); (2) they are paid by choice in that the payor need not utilize the government service; and (3) the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. Id. at 1105.

The SJC held that the exaction in question was more a tax than a regulatory fee because (1) its imposition was compulsory; and (2) the benefit was conferred not only on the payor but on the general public. In Emerson College, mere ownership of a certain class of property gave rise to imposition of the exaction fee. As evidence of the general nature of the benefit, the court pointed out that others shared in the benefit of the service provided, as the statutory formula for the assessment looked to the cost of protecting others. In addition, the court pointed out that the revenue generated by the AFSA charge was not earmarked for AFSA protection, but was used for general firefighting purposes, evidence that the exaction was a revenue-raising measure.

Since Emerson College the SJC has upheld the Cambridge Rent Control Board's exactions on landlords seeking rent adjustments as fees, not taxes, under the Emerson College test. First, as distinct from the augmented fire services at issue in Emerson College, the benefits of which accrued to the public at large, the benefits of the service of processing applications for rent adjustments accrued to the landlords. The services for which the fees were imposed were thus sufficiently particularized as to justify distribution of the costs among a limited group rather than the general public. Southview Cooperative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. at 402.

The SJC also held that the Southview fees were not compulsory, in that they were imposed only on those who chose to utilize the governmental service. Characterization of the application to receive a fair rent as a right rather than a privilege was of no avail, as such charges, if reasonably calculated to do nothing more than compensate a governmental agency for its services, were still fees, not taxes, even though they had to be paid in order that a right could be enjoyed. The critical distinction was that "the position of the landlords [was] unlike that of the property owners in Emerson College, who could not choose to forgo fire protection and thus were compelled to pay for the availability of augmented fire fighting services." Southview Cooperative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. at 402.

The landlords contended that the fees were not compensatory but were intended to raise general revenues, as the fee schedule looked only to a percentage of gross rents and did not distinguish multi-unit buildings with low rent levels from buildings with fewer units and high rents. This contention raised the question of whether the burden placed on landlords owning different types of real estate was unevenly and unfairly distributed. The SJC held that, absent evidence that the charge for an application exceeded the cost of processing, or that the charges for all applications exceeded the total cost of processing them, the landlords had failed to prove the charges constituted taxes.

The fact that the collected fees were deposited in the city's general fund, and not earmarked for application processing costs, was of no help to the landlords. Without distinguishing Emerson College, the SJC held that "[e]very fee charged by a regulatory agency will reduce the amount of funding that must come from general government revenues, and thus will substitute for funds that would otherwise have to be raised through taxes.

But, clearly, all such regulatory charges are not taxes." Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. at 404.

A City of Beverly ordinance requiring boats moored or tied to slips in Beverly waters to pay fees intended to defray the city's cost of providing harbormaster services has been upheld under the Emerson College test. See Commonwealth v. Caldwell, Slip Op. No. 87-654 (Mass. App. Ct. November 19, 1987). The defendant contended that the exaction was a tax, requiring express legislative authorization, because the harbormaster provided services to a class of the public not limited to those who were required to pay the exaction.

The Caldwell court upheld the fee under the Emerson College test on all three prongs of the test. While admitting that the benefits of the harbor-master's services did not run exclusively to the boat owners, the court found that, "[g]iven the essence of the harbormaster's function, the flow of benefits to the group of boaters required to pay is 'sufficiently particularized' to qualify it as a fee." Slip Op. at p.7. The court also found that payment of the fees was not compulsory, because "the boats are movable and the owners are free to keep them some place other than in the Beverly harbor." Slip Op. at p.8. Third, the payments did not raise general revenues, in that they compensated the city specifically for the cost of providing the harbormaster's services. The court rejected the defendant's argument that the exaction was a tax on evidence that the amount collected was not exactly equivalent to the cost of operating the harbormaster's office. Rather, the court held that "[i]t is sufficient that the revenue collected is not significantly and consistently in excess of the cost of providing the services." Slip Op. at p.9

The contemplated development processing fees are distinct from those characterized as taxes in Emerson College on all three points, being more analogous to the Southview and Caldwell fees. First, the exaction is not compulsory, as it would be imposed only on property owners seeking development review, not on a status class of property owners. Property owners seeking development review are in a position similar to that of the landlords seeking rent adjustments in Southview, and between the boat owners in Caldwell and the property holders in Emerson College. As the SJC concluded in Southview, the New York Court of Appeals has held that charging such property owners for development processing is valid as a fee. See Jewish Reconstructionist Synagogue of the North Shore v. Incorporated Village of Roslyn Harbor et al, to N.Y. 2d 158, 352 N.E. 2d 115 (1976), Supra. p.17. Second, the revenue would be earmarked to defray neighborhood planning costs, and will be calibrated to actual processing costs, thus satisfying the Southview earmarking test. The funds for neighborhood planning costs would otherwise be raised through general revenue-raising measures. Third, others would not share in the benefits of development processing in the same manner as the payor, as the benefit to developers is materially different from that which inures to the general public (unlike fire protection). On these grounds, the existence of implicit authority for imposition of the fees may be explored.

2. Authority under the Home Rule Amendment

An independent source of authority to impose the contemplated regulatory fees may be the Home Rule Amendment. The zoning power is one of a city's or town's independent municipal powers included in the Home Rule Amendment's broad grant of powers. Board of Appeals of Hanover v.

Housing Appeals Committee, 363 Mass. 339, 360 (1973). A town is no longer required to seek authority from the State in order to impose controls relative to zoning. Baldiga v. Board of Appeals of Uxbridge, 395 Mass. 829, 834 n. 5 (1985). These independent municipal powers cannot be exercised in a manner which frustrates the purpose or implementation of an applicable law. Hanover, supra at 360.

The SJC has ruled that "the General Court...had occupied the field of zoning by its enactment of the Zoning Enabling Act, G.L. c.40A... This occupation of the field...negates any implied power of the municipality in the same area." Middlesex & Boston St. Railway Co. v. Board of Aldermen of Newton, 371 Mass. 849, 856 (1977). However, G.L. c.40A does not apply to Boston. Emerson College v. City of Boston, 393 Mass. 303, 308-309 (1984). The question of whether the Home Rule Amendment may be a source of zoning power for the city of Boston remains an open question, as the General Court enacted the Zoning Enabling Act for Boston (Chapter 665 of the Acts of 1956) before passage of the Home Rule Amendment.

3. Conclusion

The Zoning Commission has the authority to require the payment of fees to offset development processing costs to the city. That these fees must be paid to the BRA bolsters the argument that they are fees and not taxes, as their direct payment is further evidence of earmarking.

Section 3 of c.665 provides express authority for charging fees for the cost of the hearing on a PDA amendment. The Zoning Commission currently charges \$225. As the BRA is expressly charged with preparing a report on such projects, implicit authority exists for charging a fee sufficient to defray the BRA's expenses in preparing this report.

To fulfill the purposes of c.665, the Zoning Commission has charged the BRA with preparing recommendations to the Board of Appeal on a variety of forms of zoning relief. The BRA also performs site plan review pursuant to Article 31 of the Zoning Code. If the Zoning Commission has the implicit authority to charge the BRA with these responsibilities, then the Zoning Commission has the implicit authority to charge necessary fees to defray the cost of providing these services, in accordance with the Southview test.

If the contemplated regulatory fees are reasonably calculated on the basis of the costs the city may reasonably incur on account of a proposed project, and the fees are used to defray those costs (even if deposited in the general fund), then they meet the test for valid land use exactions established in many jurisdictions. Under the Emerson College test, such exactions could be characterized as fees, not taxes, and therefore not require express authorization.

Using implicit authorization to defray costs, the Zoning Commission already charges for subscriptions to zoning code amendments and amended pages. Charging reasonable fees for the costs of development processing would merely be another instance of charging the beneficiaries of a government service for the cost to the government of providing the service.

IV. What Other Cities Charge

Policy Development and Research (PDR) surveyed thirteen cities to determine what, if any, development processing fees they charged. New York City, Dallas, Washington, and Cambridge charge fees. Atlanta, Baltimore, Minneapolis, and Philadelphia do not charge fees. PDR has no information at this time from Chicago, Denver, Los Angeles, San Francisco, or Seattle.

Washington charges hearing fees for zoning actions. Hearing fees for map amendments are \$250 to \$2,500 per acre (\$25,000 maximum for rezoning to residential), and \$125 to \$500 for text amendments. Fees for PUD applications or site plan or building plan review (PDAs and DRR projects in Boston) are 2.5¢/s.f. for residential projects (\$25,000 maximum), and 5¢/s.f. for other projects.

Dallas also charges fees for both planned development district applications and site plan review. The fee for applications relating to planned development districts is \$2,000 for 0-5 acres, plus \$50 for each acre over 5 (\$20,000 maximum). Fees for site plan review are as follows:

<u>Total Floor Area</u>	<u>Application Fee</u>
100,000 sq. ft. or less	\$.0027 per sq.ft. (\$270 maximum)
Over 100,000 up to and including 500,000 sq.ft.	\$50 plus \$.0022 per sq.ft. (\$1,150 maximum)
Over 500,000 sq.ft.	\$150 plus \$.002 per sq. ft. (\$2,150 for 1 million sq.ft.)

Cambridge charges five cents (\$.05) per square foot of new construction, with a minimum fee of \$150, for special permit applications involving construction of new and substantially rehabilitated floor area. Cambridge charges \$150 for special permit applications not involving construction of new or substantially rehabilitated floor area.

New York City charges for development processing under its Uniform Land Use Review procedures. The city has twelve categories of projects and associated review costs, based on the project's size, use, and total development cost.

V. Recommendations

The foregoing analysis indicates that implicit authority exists for the establishment of a development processing fee schedule. The analysis also guides the decision as to whether to charge a flat fee, an hourly fee, or a fee based on square footage.

The Jewish Reconstructionist case argues against imposition of an estimated hourly fee. The number of hours staff spend reviewing a particular project is not tied to any particular average and such a fee structure may be vulnerable to attack on its open-ended basis.

Charging a flat fee would capture most projects, but would fail to account for exceptional cases. Charging a fee based on square footage would allow for the size of a project to be taken into account. Leaving aside the largest and smallest projects, gross costs varied within a smaller range than unit costs. However, above the 300,000 s.f. threshold, the general gross cost trend was upward. If gross costs are used, the schedule should be progressive. Including all projects, unit costs varied within a narrower range than gross costs.

A proposed fee schedule, based on either unit or gross costs, would be as follows:

	<u>Unit Cost</u> <u>(Cents Per S.F.)</u>	<u>Gross Cost</u>
Basic Cost	7.5	\$ 15,000
(a) 300,000-1,000,000 s.f.		+ 20,000
(b) Over 1,000,000 s.f.		+100,000
Residential Use	2.5	<u>5,000</u>
PDA	2.5	5,000
LDA (w/o PDA)	5.0	10,000
Rehabilitation	- 2.5	- 5,000

Based on this unit cost schedule, the projects examined in this report would have paid the following fees (comparison to time management estimates included):

<u>Project</u>	<u>Est. Cost</u>	<u>Proposed Fee</u>
Fan Pier	380,642	320,000
Kingston-Bedford/ Parcel 18	229,205	221,250
Traveler's	41,409	140,600
500 Boylston	50,442	108,750
Baker Mills	17,942	55,533
125 Summer	34,742	33,633
Lowell Square	54,183	50,975
Clippership Wharf	39,896	46,875
73 Tremont	7,995	14,800
Portland Place	16,189	17,451
110-120 Tremont	13,920	15,000
Heritage	27,785	28,350
Parkside West	19,930	9,655

